DOCKET NOS. 89-6347 and A-537

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ELIJAH SMITH,

Petitioner,

vs.

RICHARD DUGGER,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS AND TO RESPONSE IN OPPOSITION TO APPLICATION FOR STAY

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Petitioner, FRANK ELIJAH SMITH, a condemned prisoner in the State of Florida who has previously petitioned this Honorable Court for certiorari review, respectfully submits the instant reply to the Brief of Respondent in Opposition to his Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals. Petitioner continues to urge that the Court grant certiorari review to resolve the fundamental conflicts with the precedents of this Court and those of other Courts of Appeals which are involved in the Eleventh Circuit's resolution of Mr. Smith's

petition for writ of habeas corpus and to resolve the important questions presented in Mr. Smith's Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit panel's disposition of the Petitioner's claim under Enmund v. Florida, 458 U.S. 782 (1982), by relying solely upon a general state court accomplice liability/felony murder sufficiency determination, although no finding under Enmund has been made by the state courts, is contrary to this Court's decision in Cabana v. Bullock, 474 U.S. 376 (1986), and in conflict with the decisions of other Circuit Courts of Appeal applying Bullock.

2. Whether the Eleventh Circuit's affirmance of Petitioner's conviction and death sentence notwithstanding the fact that the trial court refused to instruct the jury on Petitioner's sole defense to the capital charges is in conflict with and contrary to this Court's decisions in In re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), Beck v. Alabama, 447 U.S. 625 (1980), and Crane v. Kentucky, 106 S. Ct 2142 (1986), is in conflict with the decisions of other Courts of Appeal, and is in conflict with the fifth, sixth, eighth, and fourteenth amendments.

3. Whether, given the pendency of Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), Boyde v. California, 109 S. Ct. 2447 (1989), Walton v. Arizona, 110 S. Ct. 49 (1989), and Saffle v. Parks, 109 S. Ct. 1930 (1989), certiorari review should be granted to review the decision below allowing the execution of Mr. Smith's sentence of death notwithstanding the fact that the trial judge's penalty phase jury instructions shifted the burden to Mr. Smith to prove that death was not appropriate and limited full consideration of mitigating circumstances to those which outweighed aggravating circumstances, and whether the decision below is in conflict with and contrary to this Court's decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975), Mills v. Maryland, 108 S. Ct. 1860 (1988), Lockett v. Ohio, 438 US. 586 (1978), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Penry v. Lynaugh, 109 S. Ct 2934 (1989), and is in conflict with the Ninth Circuit's decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc).

STATEMENT OF THE CASE

Petitioner relies on the Statement of the Case presented in his Petition for Writ of Certiorari, noting only recent developments in Mr. Smith's state court post-conviction proceedings. On July 31, 1989, Mr. Smith filed a motion pursuant to Fla. R. Crim. P. 3.850 in the state circuit court raising,

inter alia, a claim under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), that both the sentencing jury and judge at Mr. Smith's capital proceedings failed to consider nonstatutory mitigating circumstances, that Mr. Smith's trial attorney was restrained in developing and presenting evidence of nonstatutory mitigation, and that Mr. Smith was therefore denied an individualized and reliable capital sentencing determination. On January 26, 1990, the state circuit court heard argument on Mr. Smith's Rule 3.850 motion. On January 30, 1990, the state circuit court judge denied relief, signing an order which had been prepared by the State prior to the January 26 argument. Mr. Smith timely filed a notice of appeal. The Florida Supreme Court has scheduled oral argument on Mr. Smith's appeal from the circuit court's denial of relief for Tuesday, February 6, 1990.

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's Disposition of Petitioner's Claim Under Enmund v. Florida, 458 U.S. 782 (1982), By Relying Upon Nothing More Than a General State Court Sufficiency Determination, Because Nothing More Exists in the State Court Record, and Notwithstanding the Fact That No Enmund Finding Has Ever Been Made By the State Courts, Is Contrary to This Court's Decisions in Cabana v. Bullock, 474 U.S. 376 (1986), and Tison v. Arizona, 107 S. Ct. 1767 (1987).

The Eleventh Circuit denied relief on Mr. Smith's Enmund claim by specifically relying on the Florida Supreme Court's

direct appeal statement that "there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder." Smith v. Dugger, 840 F.2d at 793, citing Smith v. State, 424 So. 2d 726, 733 (Fla. 1982)(emphasis added). The Court of Appeals' reliance on the state supreme court's sufficiency determination is precisely what this Court condemned in Cabana v. Bullock, 474 U.S. 376, 389-91 (1986).

The State argues that "[t]he Eleventh Circuit, in reviewing this record, ascertained that a requisite finding pursuant to Tison, supra, and Bullock, supra, was made not only at the trial level but at the Florida Supreme Court level" (Brief in Opposition, p. 6). This is clearly not what the Eleventh Circuit did in Mr. Smith's case: first, the requisite culpability finding cannot be based on the jury's verdict, for Mr. Smith was convicted and sentenced to death by a jury explicitly instructed that it need not consider his individual culpability for the victim's death, as the Florida Supreme Court noted on direct appeal, see Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982); second, the Eleventh Circuit specifically did not (could not) rely on any trial court findings on this issue, stating, "[w]e need not resolve the question of the adequacy of the trial court's finding," Smith v. Dugger, 840 F.2d at 793; third, the Eleventh Circuit relied only upon a sufficiency determination

made by the state supreme court, not on a finding of fact as required by Bullock, supra.

The Florida Supreme Court wrote on direct appeal that there were only two possible theories upon which the jury could have relied to find liability in this case -- accomplice liability (based on the acts of codefendant Johnny Copeland, who was separately tried) or felony murder:

> There are two theories upon which the jury might have found appellant guilty of first-degree murder based upon all the evidence, including Hall's testimony. Since there was no direct evidence establishing whether it was Copeland or appellant who actually wielded the murder weapon, the jury could have simply concluded that one of them fired the fatal shots and that the other aided and abetted the murder. . . . Under this theory, assuming that only one person did the actual killing, the other could be found guilty of premeditated murder if the evidence was sufficient to show that he aided, abetted, counseled, hired, or otherwise procured the commission of the offense of premeditated murder, and it is not necessary that the jury actually determine which man did the killing and which one aided and abetted. . . .
>
> The other theory upon which the jury could have found appellant guilty of first-degree murder is the felony murder doctrine. Under this theory appellant, as a joint participant in the crime of kidnapping, may be held liable for the acts of his co-felon and is therefore equally guilty, with the actual killer, of the murder which was a natural outgrowth and consequence of the kidnapping. Under this theory the jury would not have needed to conclude that appellant had the requisite intent to be an aider and abettor . . .

Smith v. State, 424 So. 2d at 731-32 (emphasis added). Thus, the jury was never required to make a finding respecting Mr. Smith's individual intent -- it may well have convicted on the basis of the felony murder instruction.

Specifically referring to Enmund v. Florida, the Florida Supreme Court then explained,

> It is unnecessary . . . for us to try to apply [the Enmund] holding in this case, since here there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder.

Smith v. State, 424 So. 2d at 733 (emphasis added). Of course, as the state supreme court itself had earlier indicated, there was no basis in the record on which it could be determined that the jury did find Mr. Smith guilty of premeditated murder. 724 So. 2d at 731-32. In fact, the record indicates that the jury probably did not base its decision on a premeditation theory; during their deliberations the jurors posed questions to the trial court indicating that they did not believe that Mr. Smith was the triggerman (R. 2711-13). In any event, the general jury verdict at trial and sentencing was not an Enmund finding. See Cabana v. Bullock, 474 U.S. 376, 383 (1986)(". . . neither the jury's [general] verdict of guilt nor its imposition of the death sentence reflects a finding that Bullock killed, attempted to kill, or intended to kill.").

The State also attempts to argue that the Eleventh Circuit relied on "findings" in the trial court's sentencing order, asserting, "[t]he [Eleventh Circuit] further observed that the written findings in support of the imposition of the death penalty by the trial judge satisfied the Enmund, Cabana, Tison trilogy" (Brief in Opposition, p. 5). The Eleventh Circuit clearly did not say that the trial court's findings in support of the death sentence satisfied Cabana. Rather, that court specifically refused to pass on that question and focused on the state supreme court's sufficiency determination. Smith v. Dugger, 840 F.2d at 793.[1]

Nor could the Eleventh Circuit have relied on the trial court's sentencing order. That order was inherently flawed; consequently, none of its "findings" can be accepted and none can

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[1]It is worth noting in this regard that not one of the record references made by the Respondent at pages 5-6 of the Brief in Opposition relate to any finding. All that is quoted is testimony from Victor Hall, an accomplice who testified pursuant to a cooperation agreement, who would receive 8-10 years as part of the deal, and who was not at the scene at the time that codefendant Johnny Copeland killed the decedent. Hall's testimony was contradicted by much of the other evidence, including Mr. Smith's statements to law enforcement. Hall, who testified for the State at Mr. Smith's trial but did not testify at codefendant Johnny Copeland's trial, was also impeached with letters that he and Copeland had written to each other while in the jail pretrial discussing their plans to "pin" the crime on Mr. Smith. In any event, the state courts did not rely on Hall's account to make Enmund/Bullock findings. No such findings were made in the state courts, and the Respondent's references to Hall's testimony are certainly not references to any findings.

be presumed correct. The order refers to Mr. Smith and Johnny Copeland in the conjunctive and explains that each co-defendant asserted that the other was culpable. It is clear from the order that the trial judge (who also presided over co-defendant Johnny Copeland's separate trial, see Copeland v. State, 457 So. 2d 1012 (Fla. 1984)), substantially relied on evidence which he gleaned from his experience in Copeland's separate case in his order sentencing Mr. Smith to death. This was wholly unfair, for Mr. Smith was never provided with an opportunity to exercise confrontation rights regarding Johnny Copeland's contentions respecting the events at issue. Under 28 U.S.C. sections 2254(d)(2), (3), (6), (7), and (8), there are therefore NO trial court findings to which deference was due in this case. See also Gardner v. Florida, 430 U.S. 349 (1977). The trial court's sentencing order could not be and was not credited by the Eleventh Circuit.

Nor could an Enmund finding be discerned from the Florida Supreme Court's general assertion that "sufficient" evidence was presented on which the jury could have found Mr. Smith guilty of premeditated murder. Cabana v. Bullock, supra, 474 U.S. at 389-90 (state supreme court "sufficiency" finding that "[t]he evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, [the victim]" was not an Enmund finding); see also id. (state supreme court finding

that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon [the victim]" was not an Enmund finding). In fact, the Florida Supreme Court's blanket "sufficiency" determination is much less than the findings found inadequate to meet Enmund standards in Cabana v. Bullock. Yet, it is this sufficiency determination upon which the Eleventh Circuit relied in rejecting Mr. Smith's claim. This is contrary to the express holding of Bullock.

The State also argues, in an effort to show that the Eleventh Circuit relied on the state court's ruling, that the Eleventh Circuit found that "the Florida Supreme Court . . . ratified that conclusion because '[i]mplicit in [the state supreme court's sufficiency determination] is the conclusion that Smith had the intent to kill'" (Brief in Opposition, p. 5, quoting Smith v. Dugger, 840 F.2d at 793). The State completely misses the point of Mr. Smith's argument and of Bullock. Bullock requires that the factual finding necessary to satisfy Enmund be made in the state courts. A sufficiency determination is not an Enmund fact finding. Bullock held as much. Whatever may or may not be "implicit" in a sufficiency determination, such is also not an Enmund finding of fact. What the state supreme court said on direct appeal was, "there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder." Smith v. State, 424 So. 2d at 733 (emphasis added).

This is clearly a sufficiency determination, not a finding of fact, and thus does not satisfy the requirements of Bullock. The Eleventh Circuit's reliance upon this sufficiency determination is contrary to the express holdings of Bullock and Tison v. Arizona, 107 S. Ct. 1767 (1987).

The Eleventh Circuit's holding in Mr. Smith's case is contrary to Bullock and Tison and is in conflict with the decisions of other Circuit Courts of Appeal applying Bullock. Mr. Smith's case presents a substantial question, and certiorari review is proper.

2. The Eleventh Circuit's Affirmance of Petitioner's Conviction and Death Sentence Notwithstanding the Fact that the Trial Court Refused to Instruct the Jury on Petitioner's Sole Defense to the Capital Charges Is in Conflict With and Contrary to This Court's Decisions in In re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), Beck v. Alabama, 447 U.S. 625 (1980), and Crane v. Kentucky, 106 S. Ct. 2142 (1986), Is Contrary To the Holdings of Other Courts of Appeal, and is in Conflict With the Fifth, Sixth, Eighth, and Fourteenth Amendments.

During his capital trial, Mr. Smith raised only one defense: that he withdrew from the offense before the decedent was murdered. This defense was well supported by the evidence, and was undeniably available under Florida law. The trial court, however, refused to provide the jury with any instruction whatsoever on Mr. Smith's defense. It thus directed the verdict

for the prosecution on the sole issue raised by the evidence at trial, and left Mr. Smith defenseless. The Eleventh Circuit held that there was no due process violation, Smith v. Dugger, 840 F.2d at 791-92, contrary to this Court's precedents in Winship, Mullaney, Beck, Crane, and numerous other precedents. In Rock v. Arkansas, 107 S. Ct. 2704 (1987), this Court reaffirmed the right of a criminal defendant to be heard. A criminal defendant, however, cannot be heard where, as here, a trial judge refuses to instruct the jury on his sole defense.

This issue was raised in Mr. Smith's direct appeal, see Smith v. State, 424 So. 2d at 731-32, and the Eleventh Circuit decided the issue on the merits. See Smith v. Dugger, 840 F.2d at 791-92. Nevertheless, the State argues before this Court that the issue is procedurally defaulted and that the Eleventh Circuit erroneously addressed the merits (Brief in Opposition, p. 7).

When this issue was presented in state post-conviction proceedings, the Florida Supreme Court refused to address it because the claim "either [was] or could have been presented on appeal." Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984). At no point did the Florida Supreme Court even suggest that the "federal" aspects of the issue were defaulted. Id. Thus, the Florida Supreme Court clearly applied a res judicata analysis to the issue, refusing to consider an issue which had been decided on direct appeal. To state the obvious, where a claim is raised

on direct appeal, the claim is subject to review in federal habeas corpus, even though the claim may be barred from state collateral review in the Florida courts. At the least, the Florida Supreme Court's "was or could have been raised" ruling in state post-conviction proceedings does not constitute a "plain statement" of an adequate and independent state procedural bar, and thus does not bar federal habeas corpus review of the claim. Harris v. Reed, 109 S. Ct. 1038, 1043 (1989). Mr. Smith's claim is simply not procedurally barred.[2]

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[2]It should be noted that the first time the State ever raised a procedural default argument with respect to Mr. Smith's withdrawal instruction claim was in a February 21, 1985, brief filed in the District Court. The Respondents never argued procedural default in the state courts, nor initially before the District Court. During Mr. Smith's state court collateral proceedings, the Respondents argued before the trial court that the withdrawal instruction "issue" should not be considered because it "was decided adversely to the defendant in his direct appeal" (Response to Motion to Vacate Judgment and Sentence at p. 4). On appeal of the trial court's denial of relief, the State urged that the trial court's order denying relief on "nine of ten issues . . . because they either were raised on direct appeal or could have been raised on direct appeal . . .," should be affirmed (Answer Brief of Appellee at 8). No pleading filed by the State, and no argument made by the State, informed the state courts of the position now asserted by the Respondent: that "federal" aspects of Mr. Smith's withdrawal instruction claim had been procedurally defaulted. To the contrary, the Respondent's argument was that the entire withdrawal instruction presented by Mr. Smith should not be considered because it had been decided adversely to Mr. Smith on direct appeal.

The Respondents argued res judicata, not procedural default. Consequently, the State courts must have been thinking in terms of res judicata, not procedural default, with respect to this

(footnote continued on following page)

On the merits, the State argues that no constitutional violation resulted from the trial court's refusal to provide the withdrawal instruction because the "proposed instruction was wholly inapplicable" (Brief in Opposition, p. 10). Then, incredibly, the State argues that "there was absolutely no evidentiary support for Smith's proposed instruction on withdrawal . . . . even if the instruction had included language to the effect that withdrawal can take place even after the underlying felonies are completed" (Id.).

The point of Mr. Smith's claim is that ample evidence of his withdrawal from the homicide was present and that he was thus entitled to an instruction on his sole defense. As the Florida Supreme Court explained in Mr. Smith's direct appeal, "any" supporting evidence entitles a defendant to an instruction on his

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(footnote continued from previous page)

claim. Moreover, Mr. Smith explained in all of his state court post-conviction pleadings and briefs that the claim had been decided adversely to him on direct appeal. He requested that the state post-conviction courts reconsider the claim pursuant to well-settled Florida precedents allowing for reconsideration of claims involving "fundamental error" notwithstanding an adverse ruling on direct appeal. Both parties had therefore agreed and conceded that Florida's res judicata analysis was applicable to the claim (unless, as Mr. Smith argued, fundamental error analysis were to be applied). The state courts could not but have reviewed the claim in terms of Florida's res judicata analysis. Florida's res judicata analysis applies only to claims that had been rejected on their merits on direct appeal. That is what happened here.

theory of defense, regardless of the trial court's (or the State's) view of that evidence:

> [A] defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions . . .
>
> If there is any evidence of withdrawal, an instruction should be given. The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate.

Smith v. State, 424 So. 2d at 732 (citations omitted)(emphasis added). The court also explained that when a defendant's liability is based on a felony murder theory, as was Mr. Smith's, "the defense is available even after the underlying felony or felonies have been completed." Id. The withdrawal defense was clearly available to Mr. Smith, and he was entitled to an instruction on his theory of defense. The fact that the evidence supporting his theory of defense instruction came from his own pretrial statements (which were corroborated by other evidence at trial) is of no moment under the sixth, eighth, and fourteenth amendments. It cannot be seriously argued that the prosecution can rely on a defendant's statements, and introduce them before the jury, to present its theory of prosecution, while the defendant is not allowed to rely on those same statements to present a theory of defense. That, however, is what the Florida Supreme Court held on direct appeal, and that is what the Respondent argues herein. At the least, certiorari review should

be granted to resolve the question of whether the Eleventh Circuit's ruling can be squared with due process, particularly when that ruling denies a defendant the right to have a jury instructed on his sole defense in a case in which the defendant's life is at issue.

Nor is this claim defeated, as the State argues, by the fact that counsel's proposed instruction may have had some deficiencies: Florida law has never so constrained such issues to the specific language of a defense attorney's proposed instruction, and the Florida Supreme Court did not so constrain the issue on direct appeal in Mr. Smith's case. See Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982). Under Florida law, if the defendant's request (i) clearly suggests to the trial judge the need for an instruction, (ii) on an issue that is critical to the defense, and (iii) when that issue is not covered by standard jury instructions, a proper instruction must be given by the court, irrespective of the language of the instruction requested by the defense. See generally, Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 So. 2d 817, 819 (Fla. 3d DCA 1979); cf. Smith v. State, supra, 424 So. 2d at 731-32. Mr. Smith met those standards.

The trial court's ruling deprived Mr. Smith of "an opportunity to be heard," which is "an essential component of

procedural fairness." Crane v. Kentucky, 106 S. Ct. 2142, 2146 (1986). See also Rock v. Arkansas, 107 S. Ct. 2704, 2709 (1987) ("The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of Liberty without due process of law include a right to be heard. . . ."). The trial court's refusal to instruct left Mr. Smith defenseless, see Crane, supra, and relieved the State of its burden to prove his guilt. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975). This error also deprived Mr. Smith of his due process right to a reliable verdict in a capital case. See Beck v. Alabama, 447 U.S. 625 (1980).

The failure to provide an instruction on Mr. Smith's sole defense to the capital charges denied him a fundamentally fair trial and capital sentencing determination. Because of the substantial conflicts identified in Mr. Smith's Petition for Writ of Certiorari and herein, and because of the significance of this issue, certiorari review is proper, and we respectfully urge that this Honorable Court issue its Writ of Certiorari.

3. The Decision Below Allowing Mr. Smith's Sentence of Death to Stand Notwithstanding the Fact that the Trial Judge's Penalty Phase Jury Instructions Shifted the Burden to Mr. Smith to Prove that Death Was Not Appropriate and Limited Full Consideration of Mitigating Circumstances to Those Which Outweighed Aggravating Circumstances is in Conflict With and Contrary to this Court's Decisions in Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), Penry v. Lynaugh, 109 S. Ct. 2934 (1989), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Mills v. Maryland, 108 S. Ct. 1860 (1988), and is in Conflict With the Ninth Circuit's Decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(In Banc)

The State argues that this issue is procedurally barred (Brief in Opposition, p. 11). However, the State fails to recognize that an alleged state procedural bar is only "adequate and independent", thus barring federal review, when it is fairly, clearly, and evenhandedly applied to all litigants. See, e.g., Henry v. Mississippi, 379 U.S. 433, 447-48 (1958); Tollett v. Henderson, 411 U.S. 258, 266 (1973); see also Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975); Washington v. Harris, 650 F.2d 447, 451 (2d Cir. 1981); cf. Francis v. Henderson, 425 U.S. 536, 537 n.1 (1976). Procedural rules that are not "consistently or regularly" applied are not bars to federal review. Johnson v. Mississippi, 108 S. Ct. 1981, 1987 (1988); Barr v. City of Columbia, 378 U.S. 146 (1964); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) ("state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply

evenhandedly."). The procedural bar asserted by the State is not such a bar with regard to this issue, see Henry v. Mississippi, supra at 447-48; Barr v. City of Columbia, supra; 378 U.S. 146 (1964); Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975); NAACP v. Alabama, 347 U.S. 449, 455 (1958); Wright v. Georgia, 373 U.S. 284, 289-291 (1963); Sullivan v. Little Hunting Park, 396 U.S. 229, 232-239 (1969), because a state court's refusal to entertain federal claims because of procedural bars which are inconsistently and irregularly applied violates due process and equal protection. Therefore, they are not countenanced by the federal courts. Barr v. City of Columbia, 378 U.S. at 354.

Regarding this very issue, the Florida Supreme Court has often determined the issue on its merits in post-conviction proceedings, see, e.g., Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989); Kennedy v. Dugger, 527 So. 2d 912 (Fla. 1989); Marek v. Dugger, 547 So. 2d 109 (Fla. 1989); Tompkins v. Dugger, 549 Sc. 2d 1370 (Fla. 1989); Jackson v. Dugger, ___ So. 2d ___ (Fla. Dec. 11, 1989); Hill v. Dugger, ___ So. 2d ___ (Fla. Jan. 26, 1990), while imposing a procedural bar against other litigants such as Mr. Smith. In such circumstances, the procedural bar asserted by the State is not an "adequate" state ground precluding federal review. Johnson; Barr; Hathern, supra.

Moreover, the instruction at issue herein "serve[d] to pervert the jury's deliberations concerning the ultimate question

whether in fact [Frank Smith should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1968). By requiring the imposition of death unless Mr. Smith established that mitigation outweighed aggravation, the instruction "precluded the development of true facts," id., for it allowed consideration of only that mitigating evidence which was sufficient to outweigh the aggravation. In such circumstances, the ends of justice require consideration of the claim on its merits.

Mr. Smith's death sentence is unreliable, and is founded upon instructions which "precluded" and hindered the jury's full and proper consideration of mitigating facts. Cf. Smith v. Murray, supra. Certiorari review in order for the Court to assess this claim in conjunction with the Court's forthcoming decisions in Blystone, Boyde, Walton, and Parks would be more than proper. Accordingly, given the pendency of Blystone, Boyde, Walton, and Parks, and the Eleventh Circuit's erroneous disposition of this claim, a disposition which is in conflict with Adamson, Mills, Lockett, Eddings, Penry, Woodson, and Hitchcock, supra, this Court should grant Mr. Smith's petition for a writ of certiorari to resolve the fundamental conflicts identified herein.

CONCLUSION

Based on the presentation in his Petition for Writ of Certiorari and on the foregoing, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari in order to review the substantial and important federal constitutional issues presented, and in order to resolve the fundamental conflicts among courts identified. Resolution of these issues will have a real and direct bearing on whether Petitioner lives or dies. Resolution of these issues will also have a real effect on the cases of other death sentenced Florida inmates. This Court has granted certiorari review in the past under similar circumstances. Given the importance of these claims to capital inmates in Florida, and in this case to the question of whether Mr. Smith will live or die, it is respectfully urged that certiorari review in this case would be appropriate. We therefore respectfully pray that the Court grant certiorari review in this action. Based on the foregoing, Petitioner also respectfully urges that the Court stay his execution, currently scheduled for February 9, 1990.

Respectfully submitted,

LARRY HELM SPALDING
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~United States Mail, first class,~~ hand delivery, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 1st day of February, 1990.

Billy H Nolas
Attorney